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No. 02-482

IN THE

Supreme Court of the United States

DESERET BOOK COMPANY; DEAN HUGHES,
Petitioners,

v.

GENE S. JACOBSEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* AUTHORS GUILD, INC., ASSOCIATION OF AMERICAN PUBLISHERS AND BONNEVILLE INTERNATIONAL CORPORATION IN SUPPORT OF PETITIONERS

VON G. KEETCH*
BERNIE S. BROADBENT
ALEXANDER DUSHKU
KIRTON & MCCONKIE
A PROFESSIONAL CORPORATION
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
(801) 328-3600

CARTER G. PHILLIPS
GENE C. SCHAERR
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

October 25, 2002

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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MOTION OF AUTHORS GUILD, INC., ASSOCIATION OF AMERICAN PUBLISHERS AND BONNEVILLE INTERNATIONAL CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici Curiae Authors Guild, Inc., Association of American Publishers and Bonneville International Corporation respectfully request leave of this Court to file the following brief in the above captioned manner. In support of its motion, *amici curiae* states as follows:

The petitioners have granted their consent in writing to the filing of this brief. Petitioners' written consent has been filed with this brief. However, respondent has denied consent to the filing of this brief, thus necessitating this motion.

Amici are deeply concerned about the chilling effect of the decision below on authors, publishers, broadcasters, and other members of the media. Accordingly, *amici* support the

petition for a writ of certiorari filed by Deseret Book Company and Dean Hughes, the defendants in this copyright suit.

Each of the *amici*, moreover, has a vital interest in the proper application of the copyright laws to historical materials. The Authors Guild, Inc. is a national association of more than 8,000 professional book and periodical writers of all genres, including novelists, children's book authors and illustrators, journalists, scholars, historians, biographers and other writers of fiction and nonfiction. Founded in 1912, the Guild is the oldest and largest organization of published writers in the United States. Guild members have won Nobel and Pulitzer Prizes and countless other awards and honors. Among the Guild's principal purposes are to express its members' views in cases involving the interpretation of the Copyright Act and to protect the invaluable rights the Act provides to authors. The Guild appears as *amicus curiae* supporting the Petition because the decision below threatens the work of all authors, and particularly biographers, historians and novelists who write on historical matters.

The Association of American Publishers ("AAP") is the national trade association of the book publishing industry in the United States. AAP's members include most of the major commercial book publishers in the U.S. as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books and journals in every field of interest, including educational materials for the elementary, secondary, postsecondary, and professional markets, as well as computer software and multimedia products and services. AAP represents an industry whose diverse, competitive members depend for their very existence on the principled application of copyright law and the rights guaranteed by the First Amendment.

Bonneville International Corporation, a subsidiary of Deseret Management Corporation and sister corporation to

petitioner Deseret Book Company, is a leading broadcast company and owner of radio stations nationwide. Bonneville also operates KSL Television, the NBC affiliate located in Salt Lake City. Bonneville produces documentaries and, like all broadcasters, frequently repackages and broadcasts news stories taken from other sources. Accordingly, Bonneville often relies on the well established copyright principles that facts are not protectible and that *de minimis* copying of expressive elements in factual works does not work an infringement.

For the foregoing reasons, the motion for leave to file the attached brief of *amici curiae* should be granted.

Respectfully submitted,

VON G. KEETCH*
BERNIE S. BROADBENT
ALEXANDER DUSHKU
KIRTON & MCCONKIE
A PROFESSIONAL CORPORATION
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
(801) 328-3600

CARTER G. PHILLIPS
GENE C. SCHAERR
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

October 25, 2002

* Counsel of Record

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INTEREST OF THE *AMICI CURIAE*[1]

The interests of the Authors Guild, Inc., Association of American Publishers and Bonneville International Corporation are set forth in the accompanying motion for leave to file as *amici curiae*.

[1] Counsel for *amici* state that they authored this brief in whole and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE PETITION

It is axiomatic that facts and ideas cannot be copyrighted, but may be freely used to create new works of fact or fiction. Accordingly, for centuries, biographers, historians and historical novelists have drawn heavily from primary and secondary source material – including letters, diaries, published and unpublished memoirs, and biographies – as the building blocks of their own works. Writers, publishers, and broadcasters turn these primary sources into literature and film. In so doing, they help the public digest, understand, and learn from the past.

In short, writers, publishers, and broadcasters cannot do their work credibly without drawing from the vast store of existing knowledge contained in prior works. Copyright law has long protected their ability to do so.

As the Petition explains, however, the Tenth Circuit has now held that an author may be found liable for copyright infringement merely because a jury could find that factual elements in a fictional work bear "too close" a resemblance to factual elements in a copyrighted factual work. As shown in the petition and discussed more fully below, this holding conflicts with established principles of copyright law. If not reversed, that holding will have disastrous consequences for the entire publishing and broadcasting industry.

Indeed, because copyright standards set by individual courts of appeals effectively govern nationwide, the decision below will inhibit the creation of important new works throughout the country. It will deter authors, publishers, and broadcasters from using facts contained in historical sources for the creation of new works of literature and televised works such as historical and biographical documentaries. Thus, the Tenth Circuit's decision thwarts a central purpose of the Copyright Act and the First Amendment – to promote the dissemination of facts and "encourage[] others to build freely upon the ideas and information conveyed by a work." *Feist*

Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991).

ARGUMENT

I. THE DECISION BELOW WILL CHILL THE CREATION OF NEW WORKS OF FACT OR FICTION, THEREBY SUBVERTING IMPORTANT INTERESTS PROTECTED BY THE FIRST AMENDMENT AND THE COPYRIGHT ACT.

The Petition well explains the importance of the question presented in this case, as well as the tension the opinion below creates with prior decisions of this Court and the outright conflict with decisions of the other Courts of Appeals. Simply stated, facts cannot be copyrighted and, therefore, a *de minimis* appropriation of expressive elements from a copyrighted factual work does not give rise to a claim for infringement. Pet. at 9-13.

The Tenth Circuit's contrary holding creates serious uncertainty for authors, publishers, and broadcasters. Accordingly, the decision below will chill the creation of new literature and productions that rely on and draw from existing histories, biographies, memoirs, and other factual accounts. In so doing, the decision will have a nationwide impact in an area of the law with profound First Amendment implications.

A. The Decision Below Will Have A Substantial, Adverse Impact On Authors, Publishers And Broadcasters.

There can be no doubt that the decision below conflicts, at least in principle, with decisions of this Court and of various courts of appeals. As this Court put it in the leading decision of *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), "The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates.'" *Id.* at 344-45 (alteration in original)

(quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)); *see* 17 U.S.C. § 102(b). As the Court also noted, "facts are not copyrightable" because "[t]o qualify for copyright protection, a work must be original to the author." *Feist*, 499 U.S. at 345. Moreover, "[t]he *sine qua non* of copyright is originality." *Id.*

Accordingly, as this Court has held, "'[n]o one may claim originality as to facts'" because "facts do not owe their origin to an act of authorship." *Id.* at 347 (quoting 1 M. Nimmer & D. Nimmer, *Copyright* § 2.11[A] (1990)). Instead, "infringement of copyright must be based on a taking of literary form, as opposed to the ideas or information contained in a copyrighted work." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 582 (1985) (Brennan, J., dissenting). Thus, "'no matter how much original authorship [a] work displays, the facts and ideas it exposes [as opposed to original expression] are free for the taking.'" *Feist*, 499 U.S. at 349 (quoting Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865, 1868 (1990)).

It follows that, "[n]otwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work" provided that original expression is not copied. *Id.* Indeed, as the Second Circuit has held, "[i]n works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another." *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir. 1980).

1. The traditional demarcation between unprotected facts and protected expression is indispensable for authors, publishers, and broadcasters whose works rely upon or draw from the historical works of others. Justice Brennan aptly noted that, "[w]ere an author able to prevent subsequent authors from using concepts, ideas, or facts contained in his or her work, the creative process would wither and scholars

would be forced into unproductive replication of the research of their predecessors." *Harper & Row*, 471 U.S. at 582 (Brennan, J., dissenting); *see Hoehling*, 618 F.2d at 979.

Indeed, as this Court put it in an early decision, "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." *Baker v. Selden*, 101 U.S. 99, 103 (1879). That is why the law leaves "a subsequent compiler . . . free to use the facts contained in another's publication to aid in preparing a competing work." *Feist*, 499 U.S. at 349.

Of course, the "[c]reation of a nonfiction work, even a compilation of pure fact, entails originality." *Harper & Row*, 471 U.S. at 547. There is no doubt that large amounts of original (and thus copyrightable) expression go into the creation of, for example, a biography or documentary, even though the work as a whole may be completely factual in nature. Accordingly, to encourage originality by writers of *both* history and fiction, "copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original . . . as long as such use does not unfairly appropriate the author's original contributions." *Id.* at 548.

The Tenth Circuit's ruling strips that critical latitude out of the law, with palpable chilling effects on authors, publishers and broadcasters nationwide.

2. The *amici* are particularly concerned about the threat the decision poses to biographers, historians, and novelists who write on historical matters, as well as those who publish such works. The decision below introduces widespread uncertainty among authors and publishers by sharply narrowing the traditionally broad latitude the law has afforded

to the copying of facts contained in diaries, letters, memoirs and other unpublished materials.[2]

This is particularly problematic because many claims of copyright infringement are made against authors and publishers of serious works that use facts from letters, diaries, or even the life stories of their subjects. Some of these suits are specifically intended to control the public's access to information about the persons portrayed. *See, e.g., New Era Publ'ns Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989) (Church of Scientology challenged critical biography of founder L. Ron Hubbard); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966). Thus, the issue embraced by the question presented – what, exactly, amounts to illegal copying of factual elements in works such as histories, biographies and memoirs – is a recurring issue of grave import.

The chilling effect of such suits on research, writing, and publishing is very real. Even the most frivolous of infringement lawsuits can last years in federal court and cost hundreds of thousands of dollars in attorneys fees. *See Scholastic, Inc. v. Stouffer*, 2002 WL 31093616 (S.D.N.Y. Sept. 17, 2002) (meritless suit claiming author of Harry Potter series infringed prior works dismissed with prejudice after two years); *Adsani v. Miller*, 1996 WL 671108 (S.D.N.Y. Nov. 20, 1996) (meritless infringement action dismissed after four years of litigation), *aff'd*, 139 F.3d 67 (2d Cir. 1998); *Norse v. Henry Holt & Co.*, 847 F. Supp. 142 (N.D. Cal. 1994) (two years). Prolonged litigation can decimate the

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[2] Copyright law protects any unregistered, unpublished writing until at least the end of 2002. *See* 17 U.S.C. § 303(a). If the previously unregistered, unpublished work is published before the end of this year, copyright will not expire until December 31, 2047. For writings that were registered, such as that of Respondent Jacobsen, copyright protects against their use by others until 70 years after the author's death. *Id.* §§ 302(a), 303(a).

financial resources of individual authors and all but the largest of publishers.

With respect to authors, moreover, this threat is direct and personal. Most published authors are contractually liable to their publishers, pursuant to the warranties and indemnification clauses included in virtually all publishing contracts, for all costs – including attorneys' fees – stemming from any claim. This indemnity obligation typically applies regardless of the claim's legal and factual merit.[3]

The certain increase in such claims as a direct result of the Tenth Circuit's decision will necessarily stifle not just the publication of new literary works, but the very use of primary sources. The uncertainty increases the risk and thus the cost of publishing new works. This, in turn, decreases the number of publications, thereby subverting the very purpose for which Congress was given the power to grant copyrights. As this court has said, "copyright [law] is intended to increase and not to impede the harvest of knowledge." *Harper & Row*, 471 U.S. at 545; *see also* U.S. Const. art. I, § 8, cl. 8 ("the Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). If allowed to stand, the decision below will undermine these basic copyright and constitutional values by deterring the creation of new works.

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[3] The fact that many publishers include the author's work under their media liability insurance coverage does not cure the chilling effect. Tad Crawford & Kay Murray, *The Writer's Legal Guide: An Author's Desk Reference* 160 (3d ed. 2002). In such cases, publishing contracts normally provide that the author must cover the publisher's defense costs to the extent of the deductible – typically $50,000 to $250,000 or higher. Random House, the nation's largest publisher, recently announced that the deductible on its coverage has been increased from $100,000 to $1 million. Press Release, Publishers Weekly (July 15, 2002). Many small publishers cannot afford media liability policies.

3. Broadcasters' activities will likewise be chilled by the decision below. Documentaries and other productions often draw from histories, biographies, memoirs, and other factual sources, raising all the risks identified above. Given the limits on primary fact-gathering capacities, broadcast news segments frequently rely upon the repackaging of existing news stories taken from other media outlets. Given that fact, and given the lightening-fast news cycle, *de minimis* copying of original expression about factual matters contained in other copyrighted news sources is virtually unavoidable.

Heretofore, such *de minimis* copying had never been thought to create a significant risk of liability. The Tenth Circuit's decision, however, subjects broadcasters to that very risk.

B. The Decision Below Will Have A Nationwide Impact In An Area Of The Law With Profound First Amendment Implications.

The need for this Court's review is heightened by the nationwide impact of any significant Court of Appeals decision in this sensitive area. As many leading copyright decisions confirm, this Court has often granted *certiorari* to review rulings of the Courts of Appeals that disrupt settled copyright doctrines or practices in publishing and related industries, even absent an unambiguous circuit conflict.[4] This

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[4] *See New York Times Co. v. Tasini*, 533 U.S. 483 (2001); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that musical parody constitutes "fair use"; petitioner alleged only a conflict in principle over treatment of musical parodies); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding that telephone white pages are not copyrightable if they lack original "selection, coordination, or arrangement"; petitioner alleged only a conflict in principle over "sweat of the brow doctrine"); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (holding that use of quotations from unpublished memoirs is not protected "fair use"; petitioner alleged only a conflict in principle over fair use doctrine); *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985) (holding that publisher was entitled to share in royalties from

Court's prompt intervention in such cases is both necessary and proper, for two reasons.

First, the publishing industry is somewhat unique in that a decision of a single circuit can effectively require a publisher to alter its practices throughout the nation. The copyright law of the Tenth Circuit, for example, governs authors and publishers in all of the other circuits and indeed throughout the rest of the world if their works are to be distributed in the Tenth Circuit, just as it governs authors and publishers in the Tenth Circuit whose works are intended for distribution to readers throughout the nation or world. Thus, a decision (like that below) which sets an aberrant standard expanding the liability of authors, publishers, and broadcasters has a chilling effect nationwide.

This chilling effect is exacerbated in today's world of instant transmission and Internet capability. Publishers and authors can no longer be certain where their works will be transmitted or distributed. Accordingly, to be relatively certain that it is complying with governing copyright law, a publisher or author must always meet the "highest common denominator" in all of the works it produces. That is, it must comply with the strictest law in all of the circuits out of a fear that some of its publications will be distributed there.

Thus, it is imperative that copyright laws throughout the United States be uniform, and that aberrant rulings be corrected quickly.

Second, writing, publishing, and broadcasting serve the highest values underlying the First Amendment. "The fortunes of the law of copyright have always been closely

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derivative works under terms of grant from author; petitioner alleged no conflict at all); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding that video tape recorder manufacturers are not liable for contributory infringement based on taping by users of the recorders; petitioner alleged only a conflict in principle with a decision of Court of Claims).

connected with freedom of expression . . . ." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 n.12 (1984) (citation and quotation marks omitted). Delay in resolving important copyright issues – or allowing individual courts of appeal to craft rules different from those uniformly accepted across the country – undermines vital First Amendment interests. Prompt correction of the error committed in the decision below is important for this reason as well.

II. GRANTING THE PETITION WILL HAVE THE ADDED BENEFIT OF CLARIFYING THE STATUS OF THE COPYRIGHT ESTOPPEL DOCTRINE.

Though not strictly raised by the question presented, granting the Petition will also help clarify the status of the doctrine of copyright estoppel, which the decision below appears to have rejected. "Under the doctrine of copyright estoppel, once a plaintiff's work has been held out to the public as factual the author-plaintiff cannot then claim that the book is, in actuality, fiction and thus entitled to the higher protection allowed to fictional works." *Houts v. Universal City Studios, Inc.* 603 F. Supp. 26, 28 (C.D. Cal. 1984); *accord Oliver v. St. Germain Found.*, 41 F. Supp. 296, 299 (S.D.Cal. 1941); 1 M. Nimmer & D. Nimmer, *Copyright* § 2.11[C] (2000) (hereinafter "Nimmer") ("[O]ne who represents his work to be completely factual may not in a subsequent infringement action prove that part of the work was fictional and therefore protectible."). The rationale for this doctrine is straightforward: If an author were allowed to change positions and assert that the work was actually fiction, it "'would unduly chill authors seeking to write about historical issues or events.'" Nimmer § 2.11[C] (quoting *Marshall v. Yates*, 223 U.S.P.Q. 453, 455 n.3 (C.D. Cal.

1983)). The doctrine has been adopted by the Second and Seventh Circuits as well as numerous lower courts.[5]

A corollary of this doctrine, specifically established in the lower courts, is that where an author claims his or her work is completely factual and then reports therein what purport to be the verbatim statements of others, the "author may not claim copyright in [such] statements." *Williamson v. Pearson Educ., Inc.*, 60 U.S.P.Q.2d 1723, 1726 (S.D.N.Y. 2001) (denying copyright protection for quotations attributed to General Patton in factual work).[6] Such statements are bare facts which cannot be copyrighted.

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[5] *See Arica Inst., Inc. v. Palmer*, 970 F.2d 1067 (2d Cir. 1992); *Nash v. CBS, Inc.*, 899 F.2d 1537 (7th Cir. 1990); *see also Nester's Map & Guide Corp. v. Hagstrom Map Co.*, 796 F. Supp. 729, 733 (E.D.N.Y. 1992) ("copyright estoppel" bars plaintiff from using "'false facts'" in allegedly factual map as basis for infringement claim); *Oliver*, 41 F. Supp. at 299; *Marshall v. Yates*, 223 U.S.P.Q. 453, 456 (C.D. Cal. 1983); *Mosley v. Follett*, 209 U.S.P.Q. 1109, 1112-13 (S.D.N.Y. 1980); *Greenbie v. Noble*, 151 F. Supp. 45, 67 (S.D.N.Y. 1957); *Davies v. Bowes*, 209 F. 53, 55 (S.D.N.Y. 1913), *aff'd* 219 F. 178 (2d Cir. 1914); *Skinder-Strauss Assocs. v. Massachusetts Continuing Legal Educ., Inc.*, 914 F. Supp. 665, 675-76 (D. Mass. 1995) ("If copying true facts is permissible, it is immaterial whether [the defendant] copied false facts or 'seeds' [referring to fictitious attorney names inserted into a legal directory for the express purpose of detecting copying]."); *Huie v. NBC*, 184 F. Supp. 198, 199-200 (S.D.N.Y. 1960) ("plaintiff represented his story to be a true story [and thus] is estopped to say that the episodes are not historical"); *Lake v. CBS, Inc.*, 140 F. Supp. 707, 708 (S.D. Cal. 1956).

[6] *See also Russell v. Turnbaugh*, 18 U.S.P.Q.2d 1948, 1951 (D. Colo. 1991) ("an author may not claim copyright violations in statements made by others and reported or quoted in their work"); *Suid v. Newsweek Magazine*, 503 F. Supp. 146, 148 (D.D.C. 1980) ("The author of a factual work may not, without an assignment of copyright, claim copyright in statements made by others and reported in the work since the author may not claim originality as to those statements."); *Rokeach v. Avco Embassy Pictures Corp.*, 197 U.S.P.Q. 155, 161 (S.D.N.Y. 1978) ("In no real sense can [the plaintiff] claim to have created these statements" that he reported in his factual work.)

The Tenth Circuit's opinion has sown significant confusion by effectively rejecting copyright estoppel in this context. The decision acknowledges that Respondent Jacobsen's work, *Who Refused to Die*, is a factual account: a "personal memoir" that in "gripping detail . . . recounts Dr. Jacobsen's survival of the Bataan Death March and subsequent years of imprisonment and torture in various work camps." App. 1a. Indeed, it was undisputed that Jacobsen held out his memoirs to petitioner Hughes as entirely factual, without any fictional elements. *See* C.A. Appellants' App. 264 (undisputed fact on summary judgment: "everything that is written in all of the versions [of *Who Refused to Die*] is all fact"); *see id.* at 10, 12, 316, 809; C.A. Appellees' Supp. App. 36. Accordingly, absent "bodily appropriat[ion] [of Jacobsen's] expression," *Hoehling*, 618 F.2d at 980, under the doctrine of copyright estoppel subsequent authors would be free to use facts from Jacobsen's memoirs in their own works without fear of subsequent liability. Those facts, moreover, would include a statement made by someone else that the memoir reports verbatim.

The Tenth Circuit's decision nevertheless holds that petitioners' copying of parts of a statement recounted in the memoirs raises a triable issue of fact as to whether elements of the statement were actually the author's original expression and thus protected notwithstanding his earlier representation to the contrary. App. 12a-14a.[7] The court reasoned:

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[7] The court quoted the relevant passage from Petitioner Hughes' work, italicizing words that are identical in the two works:

> "This time it was Potts who walked on ahead. He was carrying a souvenir sword of his own. When he stepped onto the deck, he shouted, "We need to talk," and he slammed his sword into the deck, sticking it up by its point. . . . '*Listen* to me *you guys*,' Potts went on. '*General* Douglas *MacArthur* has authorized us *to use any means* we find *necessary* to reach American troops. *We*'re *going to* cross *this bay with you or without you. If you want to take us across and get*

> We agree quotations may be freely copied if the quotation is recorded contemporaneously or taken directly from a written source . . . . Dr. Jacobsen did not, however, contemporaneously record the quotations or copy them from a written source. For this reason, a trier of fact might conclude the material in quotation marks in *Who Refused to Die* was original expression rather than the actual words used. Dr. Jacobsen may have enclosed the material in quotations merely to allow him to speak in the voice of a third party while recording his story. Because the issue of whether the dialogue in *Who Refused to Die* is original expression or fact turns, at least in part, on additional evidence to be presented at trial, the question should be determined by the trier of fact rather than the court.

Id. at 13a-14a.

By creating a triable issue regarding the originality of a verbatim report of a dialogue, the Tenth Circuit appears to have repudiated the doctrine of copyright estoppel. The decision below is thus in serious tension with decisions of the Second and Seventh Circuits and the various district courts mentioned above.

Granting the Petition will provide the Court with an opportunity to remove the cloud that the Tenth Circuit's opinion has left over this important doctrine. If the Court reverses the Tenth Circuit on the basis of the issue presented in the petition, there will be no need to address the copyright estoppel doctrine; the Tenth Circuit's apparent rejection of that doctrine will be moot. On the other hand, if the Court ultimately agrees with the Tenth Circuit's resolution of the issue presented, the Court will then have the option of addressing the copyright estoppel doctrine and thereby

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> *paid for your troubles, fine. If you don't, get off the ship, and we'll take* her across ourselves.'"

App. 13a (emphasis in original).

rectifying that important aspect of the Tenth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VON G. KEETCH*
BERNIE S. BROADBENT
ALEXANDER DUSHKU
KIRTON & MCCONKIE
A PROFESSIONAL CORPORATION
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
(801) 328-3600

CARTER G. PHILLIPS
GENE C. SCHAERR
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

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* Counsel of Record